STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS AND
THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

GERLING KONZERN ALLEGEMEINE VERSICHERUNGS AG, Subrogee of REGENTS OF THE UNIVERSITY OF MICHIGAN,

Plaintiff-Appellant,

v

CECIL R. LAWSON and
AMERICAN BEAUTY TURF NURSERIES, INC.,

Defendants-Appellees.

S.C. No.: 122938

C.A. No.: 237284

L.C. No.: 99-11061 CZ

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PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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ISSUE

The contribution statute allows one tortfeasor to bring an action against others when they are jointly or severally liable in tort for the same injury. The right exists only where the one has paid more than its pro rata share of a common liability. The 1995 tort reforms eliminated, for the most part, joint and several liability. Additionally, the reforms obligate the jury or the trial court in a tort action to specifically determine the percentage of fault of all persons who contributed to the injury. Where this is done, no tortfeasor can pay more than its pro rata share of the damages. But, if that allocation is not made in the underlying action because the case is settled short of trial, and the pro rata or percentage of fault of multiple tortfeasors has not been allocated, that allocation may be made in a subsequent contribution action between the tortfeasors. Since no allocation of fault was made on the underlying action because the case was settled short of trial, may plaintiff maintain this action for contribution?

STATEMENT OF FACTS

Plaintiff commenced this action for contribution on about November 1, 1999. The complaint alleges that defendant Cecil Lawson was an employee of defendant American Beauty Turf Nurseries, Inc., at the time of an October 21, 1997, automobile accident (14a). James Nicastri and Ricki Ash were injured in that automobile accident (13a). An employee of the University of Michigan was driving a truck that was also involved in this accident (13a). Continuing, the complaint alleges that defendant Lawson negligently operated his semi-truck and caused the injuries to Nicastri and Ash. (13-14a). The complaint also alleges that American Beauty was liable for damages as the owner of the semi-truck Lawson operated, and that it was liable for Lawson's conduct because it arose out of and in the course of the latter's employment (14a).

Defendants were advised of the mediation results in the underlying action. Likewise they were advised of and invited to attend facilitations and settlement conferences. They were invited to participate in settlement negotiations and invited to contribute to a settlement. They refused all invitations. (15a).

Plaintiff proceeded to negotiate a settlement with the underlying plaintiff's in good faith. Releases were obtained for defendants. Finally, the complaint alleges that in settling the underlying matter plaintiff paid more than its pro rata share of the common liability to plaintiffs Nicastri and Ash. (16a).

On August 1, 2000, defendants filed a motion for summary disposition (4a). All of the defendants' arguments were related to their belief that plaintiff had not complied with the requirements of the contribution statute, MCL 600.2925a. After the denial of that motion, defendants filed an interlocutory application for leave to appeal, motion for peremptory reversal,

motion for immediate consideration, and motion to stay, to the Court of Appeals, which were denied (CA No. 230446).

The matter then proceeded through case evaluation, formerly mediation, on about January 5, 2001 (3a). The case was facilitated on June 11, 2001 (3a). A final settlement conference was held immediately thereafter (3a).

On about August 30, 2001, defendants filed a motion for leave to file another motion to dismiss, that is another motion for summary disposition. This time they are argued that the 1995 tort reforms had abrogated plaintiff's contribution action. The trial court denied this motion by order entered September 28, 2001, and further denied defendants' motion for stay of proceedings (36-37a).

Defendants again filed a motion for immediate consideration, motion to stay proceedings, application for leave to appeal, and motion for peremptory reversal with the Court of Appeals. The Court denied the motion for peremptory reversal, but granted the other three. Following oral argument, the Court issued a published decision on December 3, 2002, finding that a tortfeasor who settles an underlying suit may not bring a contribution action against a co-tortfeasor due to changes implicitly made in the contribution statute by 1995 tort reform legislation.

> The statutory provisions at issue are clear and unambiguous, as is the prior case law. *Smiley v Corrigan*, 248 Mich App 51, 56; 638 NW2d 51 (2001); *Kokx, supra*. The 1995 tort reform legislation abolished joint and several liability, replacing it with "fair share liability" in actions of this nature; the parties never become "jointly and severally liable in tort" as required by MCL 600.2925a. *Smiley, supra* at 54. The purpose of this legislation is to ensure that exposure to liability is limited to a party's own pro-rata degree of fault. *Id.* Therefore, there is no longer a basis for a party

> to assert that it was exposed to liability greater than its pro-rata share, and parties in these instances are no longer entitled to contribution. For purposes of settlement, a party must assess it pro rata share of liability in arriving at the settlement amount; that it, the amount for which it could be found liable if the action were to proceed to trial. Under the 1995 tort reform legislation, plaintiff was not exposed to liability beyond its pro-rata share; therefore, plaintiff's decision to voluntarily pay pursuant to a settlement must be attributed to its own assessment of liability based on its insured's negligence. Plaintiff's claim for contribution based on its allegation that it made a payment greater than its pro-rata share thus cannot be sustained. 254 Mich App at 247-248 (41a).

This Court granted plaintiff's application. The following agreements now ensue in support of plaintiff's appeal.

ARGUMENT

The contribution statute was not repealed by the tort reform provisions of 1995 and is still viable under limited circumstances. It is true that the 1995 tort reform require that in a tort action the fact-finder specifically determine the pro rata share of each tortfeasors fault, and that as a result no tortfeasor pay more than its pro rata share of the common liability. But where no allocation of fault was made because the underlying action was settled short of trial, a contribution action may be maintained. Indeed, in those circumstances, the allocation of fault may be made in the subsequent contribution action between the tortfeasors. The Court of Appeals erred by concluding that no contribution action may be maintained when the underlying action was settled with out an allocation of fault ever being made.

Standard of Review: This Court reviews questions of statutory interpretation *de novo*. *DiBenedetto v West Shore Hospital,* 461 Mich 394, 401; 605 NW2d 300 (2000).

As the Court of Appeals said, this case presents an issue of first impression: "Whether the 1995 tort reform legislation permits contribution in cases where one tortfeasor settled with the injured party". 254 Mich App 241, 244; 657 NW2d 143 (2003). That Court concluded that it did not. In reaching this conclusion, the Court has created a statutory conflict that does not exist.

The contribution statute, MCL 600.2925a, allows a contribution action where two or more persons are jointly *or* severally liable. It does not require that two or more persons be jointly *and* severally liable. The Court of Appeals' opinion held that no contribution action could proceed here because no finding of joint *and* several liability was made below. By statute, it is not necessary that there be joint *and* several liability. Accordingly, the elimination of joint and several liability in

most tort actions, MCL 600.6304(4), 1995 PA 161, 249, by itself, has no effect on contribution actions.

Further, the contribution statute does *not* require that in the underlying action the plaintiff had to be *exposed to* more than its pro rata share of the common liability. Rather, the statute allows an action where the plaintiff can allege and then prove that it *paid more* than its pro rata share of a common liability. Plaintiff here can make this allegation because no allocation of fault was made in the underlying action before it was settled.

Additionally, the contribution statute allows an action where the underlying case was settled. The Court of Appeals opinion suggests that no action may be maintained here because plaintiff and defendants *never became* jointly and severally liable in tort. Tort reform did not change this.

Section 6304(1) of the Revised Judicature Act, MCL 600.6304(1), part of the 1995 tort reform, requires "in an action based on tort" that "the court, unless otherwise agreed by all the parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings" relative to the plaintiff's total damages and the percentage of fault of all persons that contributed to the injury. This statute does *not* require the trial court to allocate the fault of all tort-feasors in a tort action that is settled short of trial. Because the underlying action here was settled short of trial, no allocation of the percentage of fault was made. Thus, defendant can allege that it paid more than its pro rata share of a common liability.

To conclude, the Court of Appeals has misconstrued the law. The Court of Appeals has issued a published opinion that bars contribution actions where in the underlying tort action no allocation of fault was ever made. This is inconsistent with the applicable statutory provisions and

is contrary to good public policy, which encourages the quick settlement of cases and seeks a result in which every tortfeasor pays its fair share.

Standard of review of a motion for summary disposition

Defendants brought a late motion for summary disposition pursuant to MCR 2.116(C)(8). In deciding a (C)(8) motion[1], the Court must accept all factual allegations as true and construe them favorably to the plaintiff. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992); *Blair v Checker Cab Co*, 219 Mich App 667, 673; 558 NW2d 439 (1996). This means that: defendants were involved in the car accident, along with plaintiff, in which underlying plaintiffs' Nicastri and Ash were injured; that defendants owed a duty to the underlying plaintiffs that they breached; that this breach was the proximate cause of the underlying plaintiffs injuries; that plaintiff settled that case, securing releases of liability for defendants; and that plaintiff paid more than its pro rata share of the common liability to Nicastri and Ash (16a). Of course, the question is whether these facts state a valid cause of action.

Rules of statutory construction

This case presents a question of statutory construction. This Court's [redacted]

be enforced as written. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996). The first criterion in determining intent is the specific language of the statute. The Legislature is presumed to have intended the meaning it plainly expressed. If the plain language of the statute is clear, no further judicial interpretation is necessary. *In re Worker's Compensation Lien (Ramsey v Kohl),* 231 Mich App 556, 561; 591 NW2d 221 (1998). The court must give the words of a statute their plain and ordinary meaning, and only where the statutory language is ambiguous may it look outside the statute to ascertain the Legislature's intent. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995).

At issue here is the interplay between the contribution statute, MCL 600.2925a and parts of the 1995 tort reforms, specifically the changes made to MCL 600.6304.

1995 tort reform

The 1995 tort reforms, for the most part, eliminated joint and several liability in tort actions and replaced it with fair share liability: "Liability in an action to which this section applies is several only and not joint." MCL 600.6304(4); *Smiley v Corrigan,* 248 Mich App 51, 55; 638 NW2d 151 (2001). The purpose of tort reform was to ensure that any party's obligation to pay damages is limited to its pro rata degree of fault. *Smiley, supra* at 55. This was accomplished by statute. "[T]he court, unless otherwise agreed by all defendants and nonparties, shall instruct the jury to answer special interrogatories or, if there is no jury" the court is required to make specific findings regarding each plaintiff's total damages and the specific "percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action." MCL 600.6304(1). **In the case at bar, because the underlying action was settled short of trial, no allocation of fault was made in**

the underlying case. Further, except in circumstances not applicable here, "a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found" by the factfinder. MCL 600.6304(4). Thus, liability is now generally several, not joint and several. *Id.* These are the applicable provisions of the 1995 tort reforms. Now for the contribution provisions.

Contribution statute

There was no contribution at common law. *Theophelis v Lansing General Hospital*, 430 Mich 473, 482; 424 NW2d 478 (1988); *O'Dowd v General Motors Corp,* 419 Mich 597, 603; 358 NW2d 553 (1984). Contribution "is defined as 'the partial payment made by each or any of jointly or severally liable tortfeasors who share a common liability to an injured party.'" *St. Luke's Hospital v Giertz,* 458 Mich 448, 453; 581 NW2d 665 (1998). The contribution statute applies "when 2 or more persons become jointly **or** severally liable in tort for the same injury." MCL 600.2925a(1)(emphasis added). The right to contribution exists only in favor of the tort-feaser "who has paid more that his pro rata share of the common liability". MCL 600.2925a(2). Finally, the right to contribution is available to a tort-feasor who settles an underlying action short of trial. Section 2925a(3) contains four specific elements that a plaintiff must allege and prove where it settled the underlying action with the injured plaintiff. Thus, a contribution action for a settling tort-feasor consists of six elements.

> (1) there must be joint liability on the part of the plaintiff and defendant, (2) the plaintiff must have paid more than the plaintiff's pro-rata share of the common liability, (3) the settlement entered into by the plaintiff must extinguish the liability of the defendant, (4) a reasonable effort must have been made to notify the defendant of the pendency of the settlement negotiations, (5) the defendant must be given a reasonable opportunity to participate in

> settlement negotiations, and (6) the settlement must be made in good faith.

Reurink Brothers Star Silo, Inc v Clinton County Road Commission, 161 Mich App 67, 72-72; 409 NW2d 725 (1987); *Klawiter v Reurink,* 196 Mich App 263, 267; 492 NW2d 801 (1988).

Now these cases state that the first element to prove is "joint liability." Defendant argues that joint liability has been abolished. In fact, it is "joint and several" liability that has been abolished. Joint liability, to state the obvious, is not joint and several liability. Joint liability means "[l]iability for which more than one person is responsible." *Black's Law Dictionary (5th ed),* p 823. Joint tort-feasor "refers to two or more persons jointly or severally liable in tort for the same injury to person or property." *Id.* at 752-753. Michigan defines it as "two or more persons who owe to another the same duty and whose common neglect of that duty results in injury to such other person. *Moyses v Spartan Asphalt Paving Company,* 383 Mich 314, 329; 174 NW2d 797 (1970)." *Sobotta v Vogel,* 37 Mich App 59, 61-62; 194 NW2d 564 (1971). "[C]ommon liability exists among individuals who are responsible for an accident which produces a single indivisible injury." *Carissimi vJonas,* 219 Mich App 546, 550; 557 NW2d 148 (1996), citing *Salim v LaGuire,* 138 Mich App 334, 341; 361 NW2d 9 (1984); see also *Caldwell v Fox,* 394 Mich 401, 420 n 5; 231 NW2d 46 (1975).

Additionally, while the cases declare that the first element of a contribution action is joint liability, the statute allows a contribution action where there is either "joint or several liability". MCL 600.2925a(1).

Defendants have argued that there was no joint liability or no common liability here as a matter of law and therefore there can be no basis for a contribution action. This misstates what is meant by joint liability or common liability. What there is not is joint and several liability, what

there is, and what the contribution statute requires, is that there are multiple actors producing a single personal injury who are then jointly or severally liable.

The issue on appeal has thus been narrowed to this: can plaintiff allege that there was joint **or** several liability on the part of the plaintiff and defendant, and that it paid more than the its pro rata share of the common liability. Defendants' theory is that because there is no joint **and** several liability no tort-feasor can be held liable for more than its pro rata share of any common liability, thus there can be no contribution action. Plaintiff's theory is that it can allege that it paid more than its pro rata share of a common liability. It can make this allegation because no allocation of fault was made in the underlying action. The Court of Appeals accepted defendants theory, but only by misconstruing the applicable statutory provisions.

Court of Appeals decision

The Court of Appeals held that tort reform "abolished joint and several liability, replacing it with fair share liability". 254 Mich App at 247. This is generally true. Therefore, "the parties never become 'jointly and severally liable in tort' as required by MCL 600.2925a." *Id.* This is true, but irrelevant. **The contribution statute does not require that the parties actually become jointly and severally liable in tort.** To the contrary, the statute states that contribution lies generally "when 2 or more persons become jointly **or** severally liable in tort for the same injury." MCL 600.2925a(1) (emphasis added). Defendants had erroneously argued that a contribution action requires a prior finding of joint and several liability. (Defendants' brief, p 14).

At defendants' urging the Court of Appeals made a second error. Defendants repeatedly said that a contribution action required that the plaintiff must have been exposed to liability or held liable for damages in excess of its pro rata share. (Defendants' brief, pp 9, 10, 11, 13, 14). The Court made having been exposed to excess liability a requirement of a contribution

action. The Court said that fair share liability precludes a party from ever having to pay more than its pro rata share of damages, so therefore "there is no longer a basis for a party to assert that it was *exposed to* liability greater than its pro-rata share", and thus there is no basis for a contribution action. 254 Mich App at 247 (emphasis added). "Under the 1995 tort reform legislation, plaintiff was not *exposed to* liability beyond its pro rata share." *Id.* The contribution statue does not require a party to assert that it was "exposed to" liability in excess of its pro rata degree of fault; it must allege that it "paid more" than its pro rata share. MCL 600.2925a(2). The statute does require that the plaintiff have "paid more than his pro rata share of the common liability." MCL 600.2925a(2). It is true, however, that before 1995 a joint tort-feasor was exposed to liability that may have exceeded its pro rata share of a common liability, but that has never been an *element* of a contribution action.

The Court was right that that tort reform prevents a party from having to actually "pay more" than its percentage of fault of the total liability. Defendants argue this point repeatedly. But, defendants do not want any court to determine whether this plaintiff paid more than its pro rata share of the common liability. It may be that plaintiff paid more that its pro rata share when it settled the underlying litigation. And this is something tort reform sought to prohibit.

Further, defendants repeatedly argued that plaintiff was never "compelled" or "obligated" to pay more than its pro rata share of the liability. (Defendants' brief, pp 6, 12, 13, 14). This argument presumes that contribution may only be had if the underlying matter was tried. As already indicated, a contribution action is clearly permissible where the underlying case was settled. MCL 600.2925a(3); *Reurink Brothers Star Silo, Inc v Clinton County Road Commission, supra*; *Klawiter v Reurink, supra.* The Court of Appeals appears to have, erroneously, agreed, stating that

the parties "never became" jointly and/or severally liable because there was no trial. 254 Mich App at 247.

Continuing in the same vein, if anything language in § 6304 supports plaintiff's argument that a contribution action may follow a settlement. Section 6304 does not require an allocation of fault to be made in cases that do not go to trial: the obligation to determine the total fault of all persons contributing to the death or injury must be made by a jury on special interrogatories or by the court making specific finding, *i.e.*, the case is tried.[2] Section 6304(1)'s requirements were not applied in the underlying action and the percentage of fault of plaintiff and defendants in that action were not determined. Thus, a contribution action is not barred and plaintiff must be given the opportunity to establish that it paid more than its pro rata share of the common liability.

A federal judge has recognized this. It bears noting that while this case was cited to the Court of Appeals, the Court neither noted, commented, or analyzed the decision.

The case is *CSX Transportation, Inc v Union Tank Company,* 173 F Supp 2d 696 (ED Mich 2001). In this case the plaintiff railroad allegedly settled 3,600 claims arising from damages resulting from a propane fire involving its train. It then brought an action against the defendants seeking, among other things, contribution. The defendants moved for partial summary disposition on that claim.

The basis of the defendants' argument is not clear, but it is reasonable to believe that they argued that Michigan no longer recognized contribution actions. After setting out the

[2] The *Kokx* Court implicitly recognized this. It stated that "under the plain language of the revised statutes, a defendant cannot *be held liable* for damages beyond the defendant's pro-rata share, except under certain specified circumstances." 241 Mich App 663 (emphasis added). Obviously, to "be held liable" means the case was tried. The other "specific circumstances" are noted in MCL 600.6304(6) and MCL 600.6312. The non-specified circumstances are when the case is settled.

contribution statute, the court referred to the 1995 tort reforms. It noted the near elimination of joint and several liability, and the duty to determine and allocate the fault of all tort-feasors. The court accurately noted that given this duty "in the usual case, the allocation of fault is mandated, there will usually not be a circumstance where a tort-feaseor has paid more than his pro-rata share of the common liability. Thus, there would be no need for a claim of contribution." 173 F Supp 2d at 699-700.

But, the court noted that, as in the case at bar, the underlying claims had "been settled without an allocation of fault. One tort-feasor has paid 100%, although there are likely other tort-feasors which can be allocated some of the fault." *Id.* at 700. The plaintiff was "seeking an allocation of fault between the tortfeasors in this case. It is seeking neither 'joint liability,' nor 'joint and several liability.' Plaintiff CSXT is entitled, under Michigan law, to show that the Defendants and Plaintiff CSXT were/are severally liable (with an appropriate allocation of the percentages of fault) for the" accident. *Id.* at 699. Again, the Court of Appeals ignored this case, which while not binding precedent, demanded some consideration from the Court.

The Court here did refer to *Kokx v Bylenga*, 241 Mich App 655; 617 NW2d 368 (2000). This decision did not address the issue whether a contribution action could be pursued where the underlying case was settled. Bylenga had first represented Kokx in a breach of contract action against Kokx's former employer. At some point during those proceedings, Miller Canfield substituted in for defendant Bylenga. The original lawsuit was eventually dismissed. About 2 1/2 years later, Kokx filed a legal malpractice suit against Bylenga. Approximately six months later, defendant Bylenga filed a motion for leave to file a third-party complaint against Miller Canfield. That motion was never ruled on and the suit was dismissed by stipulation of the

parties. Suit was re-filed in January 1997, and in May 1997, defendant Bylenga again filed a third-party complaint against Miller Canfield for indemnification and contribution. 241 Mich App 657-658. Eventually, the circuit court granted Miller Canfield's motion and found that the 1995 tort reform legislation barred defendant Blevin's contribution action. The Court affirmed.

The Court noted that § 6304(1) states that the liability of each party shall be allocated and turned into a percentage of fault, and that § 6304(4) explicitly states that a party shall not be required to pay damages in an amount greater than its percentage of fault. It then noted that under the contribution statute an allegation that the party paid more than its' pro rata share of the common liability was a *sine qua non* to the action. Therefore, the Court held "that *to the extent* that the statutes enacted as part of the Legislature's 1995 tort reform do not allow a person to be held responsible for paying damages beyond the person's pro-rata share of responsibility as determined under § 6304, claims for contribution are no longer viable." 241 Mich App at 664 (emphasis added). This holding is correct *to the extent* that there has been an allocation of fault made in a prior action pursuant to § 6304(1). In contrast, when no allocation has been made, a contribution action may lie. The case at bar is such a case.

Public Policy

Finally, the construction of the statute plaintiff urges is consistent with public policy. The policy of this state is to encourage settlements. See *Brewer v Payless Stations, Inc*, 412 Mich 673, 679; 316 NW2d 702 (1982); *Watts v Department of State*, 394 Mich 350, 357; 231 NW2d 43 (1975); *Transportation Department v Christensen*, 229 Mich App 417, 429; 581 NW2d 807 (1998); see also, MRE 408 ("Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or

amount is not admissible to prove liability for or invalidity of the claim or its amount."); MRE 409 ("Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.") Allowing settling defendants to pursue contribution actions against other settling defendants where the percentage of fault of neither has been determined ensures that benefits are paid to injured plaintiffs as quickly as possible while allowing joint tortfeasors to adjudicate their liability to one another separately.

The *CSX Transportation* court recognized this.

> In the instant case, Plaintiff CSXT is seeking an allocation of fault under Michigan law. Because CSXT has settled numerous lawsuits, paying the full share of each, CSXT can assert that it has paid more than its pro-rata share of the liability. Thus, under Michigan law, it has a claim for contribution.
>
> If the purposes behind the Michigan tort reform legislation were speedy settlement of suits, and allocation of fault, thwarting CSXT's ability to seek contribution defies both of those objectives. First, without the possibility of seeking "reimbursement" from other tortfeasors, CSXT would have no interest in seeking a speedy settlement of claims. Further, allowing CSXT to bring a claim for contribution further the purpose of holding tortfeasors responsible for their share of the liability. 173 F Supp 2d at 700.

It was in this area that the Court of Appeals made a statement that is not in accord with reality and is against public policy. The Court said that for "purposes of settlement, a party must assess its pro-rata share of liability in arriving at the settlement amount; that is, the amount for which it could be found liable if the action were to proceed to trial. Under the 1995 tort reform legislation, plaintiff was not exposed to liability beyond its pro-rata share; therefore, plaintiff's decision to voluntarily pay pursuant to a settlement must be attributed to its own

assessment of liability based on its negligence." 254 Mich App at 247. Defendants do everything within reason to keep matters from going to juries, where the sky is the limit on damages. The underlying case was settled for about $2,250,000. If it was tried, the verdict could have been anything, it could have been $10,000,000. It could have taken months to try and many more months to be appealed leaving the injured parties without financial means. The Court of Appeals decision thwarts public policy, which would be fine if statutory language supported it. But it doesn't.

Finally, plaintiff's construction is also consistent with the purpose of the 1995 reforms. "The Michigan Legislature abolished and replaced joint and several liability with 'fair share liability.' The significance of the change is that each tortfeasor will pay only that portion of the total damage award that reflects the tortfeasor's percentage of fault [and, one might add, "if the case is tried"]." *Smiley v Corrigan*, 248 Mich App at 55. The instant plaintiff believes defendants to also be at fault for the original plaintiff's injuries. As of today's date, they have paid none of the original plaintiff's damages, nor has their percentage of fault been determined to be zero. The contribution action against them must proceed so that they can pay their fair share of the common liability.

Conclusion

In conclusion, the Court of Appeals erred in its interpretation of these statutes. The contribution statute allows an action where two or more persons are jointly or severally liable. It allows an action where the underlying case was settled. There is no requirement that the plaintiff had to be exposed to more than its pro rata share of the common liability. The contribution statute allows an action where the plaintiff can allege that it paid more than its pro rata share of a common liability. Plaintiff here can because no allocation of fault was made in the underlying action.

Section 6304 does not require that an allocation of fault be made in a tort action that is settled short of trial. The Court of Appeals' published opinion should be reversed.

RELIEF

WHEREFORE, plaintiff-appellant, Gerling Konzern Allegemeine Versicherungs AG, Subrogee of Regents of the University of Michigan, requests that this Court enter an order reversing the Court of Appeals opinion and remanding the case to the trial court for further proceedings.

Respectfully submitted,

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Dated: December 31, 2003